BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation of	)	RM-8355
Foreign-affiliated Entities	)	RM-8392

COMMENTS OF IDB COMMUNICATIONS, INC.

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TO: The Commission

COMMENTS OF IDB COMMUNICATIONS GROUP, INC.

IDB Communications Group, Inc. ("IDB"), by its attorneys, hereby comments on the Notice of Proposed Rulemaking ("Notice") released by the Commission on February 17, 1995 in the above-captioned proceedings. These comments address the Commission's proposal to "codify" a policy on international private line ("IPL") resale and a definition of facilities-based international carrier. See Notice at ¶¶ 67-71 & 79.

IDB is the largest provider of IPLs, and IDB's parent company, LDDS Communications, Inc., is the fourth largest provider of switched services, in the United States. With substantial operations in both the IPL and switched services markets, IDB is well-positioned to provide the Commission with a balanced and forward-looking view of how the Commission's policies can facilitate the development of a Global Information Infrastructure ("GII") by promoting competition and open markets in the U.S. and foreign countries.

Introduction and Summary

The Notice raises a diverse array of issues regarding the Commission's international telecommunications policies. In response to AT&T's petition for rulemaking (RM-8355), the

Commission has proposed an effective market access policy to govern the entry by foreign carriers into the U.S. international telecommunications market. The Commission formulated its effective market access proposal to advance the goals of opening foreign markets to new entry by U.S. entities, promoting competition in the U.S. market, and deterring anti-competitive conduct. IDB shares the Commission's goals, but believes that the Commission has failed to apply its goals, particularly the goal of maximizing competitive entry in foreign markets, to its analysis of IPL resale.

The pro-competition goals in the Notice are especially appropriate for analyzing the issues raised by the Commission regarding its IPL resale policy. Although the Commission's stated intent is to clarify and codify its current IPL resale policy, the Notice in fact proposes to expand the scope and application of the policy far beyond what the Commission intended when it adopted the policy in 1991. In particular, the Notice proposes a definition of facilities-based carrier which is different from the definition the Commission used in 1991, and the Commission evinces for the first time an intention for the policy to cover facilities-based U.S. carriers based upon the activities of the correspondent foreign carrier at the foreign end. This "codification" is really a substantial expansion of the IPL resale policy, which must be recognized and justified on a de novo basis as a matter of U.S. public policy.

The Commission would not adopt its proposed codification (and expansion) of the IPL resale policy were it to examine its

proposal in light of the objectives underlying the effective market access policy. As proposed in the Notice, an expanded IPL resale policy would keep U.S. carriers out of newly-opening foreign markets and undermine the growth of revenue and traffic in the U.S. telecommunications industry. Further, an expanded IPL resale policy would curtail the existing right of subscribers, including multinational U.S. corporations, to interconnect their private lines to the U.S. public switched network ("PSN") through a carrier's central office. By erecting entry barriers around foreign markets and restricting IPL interconnection options for business customers, the expanded IPL resale policy would result in U.S. businesses with overseas offices paying higher foreign collection rates.

When it adopted the IPL resale policy in 1991, the Commission carefully distinguished between one-way IPL resale, which is prohibited to countries which do not offer "equivalent" resale opportunities, and one-way IPL interconnection, which is expressly permitted to all countries. In order to preserve that crucial distinction, the Commission needs a principled definition of facilities-based carrier. The Commission offers no rationale for its proposed definition, which makes apparently arbitrary distinctions between (i) U.S. carriers who lease capacity from COMSAT versus U.S. carriers who lease capacity from other common carriers; and (ii) U.S. carriers who lease capacity in non-common carrier systems versus U.S. carriers who lease capacity in common carrier systems. This is not the definition which the Commission recognized in 1991 when it adopted the IPL resale policy, and

neither the Commission nor other parties have offered any logical or policy explanation for this definition.

More troubling is the Commission's suggestion that it will apply a narrower definition of facilities-based carrier to the provision of the foreign IPL half-circuit by a foreign carrier. The Notice suggests (at ¶ 71) that all "foreign leased circuits" would constitute resale, even when a foreign carrier engages in precisely the same activity which would be regarded as a facilities-based activity if undertaken by a U.S. carrier. A U.S. carrier leasing INTELSAT capacity from Comsat would be regulated as a facilities-based carrier, but apparently a foreign half-circuit provider leasing INTELSAT capacity from the signatory in its own country would be a reseller. Similarly, a U.S. carrier leasing capacity from a non-common carrier separate satellite system would be a facilities-based carrier, but apparently a foreign carrier leasing the matching half-circuit on the same system would be a reseller.

The Commission offers two rationales for adopting a double standard for foreign carriers (including the affiliates of U.S. carriers). Neither rationale withstands scrutiny. First, the Commission desires to avoid increasing the U.S. settlements imbalance. However, standing alone, an increase in the imbalance is neither good nor bad. Any service must be analyzed in the broader context of its impact upon U.S. revenues and traffic growth, competition in the U.S. and global markets, and the collection rates paid by U.S. consumers. Given that country direct and country beyond services have led to massive increases

in the U.S. settlements imbalance in recent years, the Commission can no longer use, if it ever could, the alleged impact upon the settlements imbalance as a litmus test for the lawfulness of a service.

The Commission's second reason for a non-uniform definition of facilities-based carrier is to avoid sending improper or mixed signals to foreign countries about the degree of market openness the U.S. Government finds acceptable. However, it is the Commission's effective market access policy which, if adopted, will send a signal to foreign countries about the desired degree of market openness. Should the Commission desire to reinforce that signal, it could, if it adopts the effective market access policy, emphasize that it contemplates foreign countries opening their markets to full ownership of the underlying transmission facilities by U.S. carriers at the foreign end. It would be improper for the Commission to let a matter of terminology dictate the substantive scope of its IPL resale policy.

IDB continues to support the "maximum interest" approach in fashioning a non-discriminatory, uniform definition of facilities-based carrier for U.S. and foreign carriers alike. Under that approach, all U.S. or foreign carriers who purchase the maximum interest in an international facility permitted by law would be regarded as facilities-based carriers. In the alternative, the Commission should clarify that foreign carriers operating in the same manner as a U.S. carrier (e.g., leasing

INTELSAT capacity from the national signatory) would be classified the same under the applicable definition.

At a minimum, the Commission should adopt a rule that all affiliates of U.S. carriers in foreign markets will be regulated as facilities-based carriers. There can be no doubt that U.S.-affiliated companies come from a country with an open telecommunications market, nor can there be any doubt that the benefits of the IPL interconnection services offered by U.S. companies in foreign markets will primarily benefit U.S. interests. Permitting U.S. companies to enter foreign markets would promote the Commission's objective of opening foreign markets, and it would ensure that U.S. multinational customers will continue to have the same access as today to services offering IPL interconnection at a carrier's central office. It would turn the Commission's policies and goals on their head to adopt a definition of facilities-based carrier which keeps U.S. carriers from entering foreign markets.

Similarly, the Commission has not laid any groundwork for expanding the IPL policy to encompass facilities-based U.S. carriers when the foreign half-circuit provider is regarded as a reseller. Such a policy would have the same effect as a non-uniform definition of facilities-based carrier. U.S. carriers would be excluded from newly-opening foreign markets, U.S. revenues and traffic growth would be adversely affected, and U.S. multinational customers would find their right to interconnect IPLs to the U.S. PSN at a carrier's central office substantially curtailed. Such a policy expansion also would raise difficult

legal questions regarding the existence and scope of the Commission's jurisdiction over services provided by foreign carriers on the foreign half-circuit subject to foreign regulatory authorities.

The Commission should not codify any changes to the IPL resale policy unless it first thoroughly analyzes the policy implications of such changes. Any changes it codifies should be applicable only on a prospective basis so that interested carriers have an opportunity to review their operations to assure that they comply with the new rules.

I. THE FCC'S CURRENT POLICIES DISTINGUISH BETWEEN IPL INTERCONNECTION AND IPL RESALE

One of Commission's earliest and most successful pro-consumer and pro-competition policies has been the right of subscribers to interconnect their telephone lines to the terminal equipment of their choice.[1] A corollary of that policy is the subscriber's freedom to interconnect a domestic or international private line to the PSN. When the Commission adopted the IPL resale policy in 1991, it underscored that its policy affected IPL resale, not the interconnection of IPLs to the PSN by end users. The Commission stated:

> "At the outset it is necessary to clarify that in this decision we address resale of international private lines for the provision of telecommunications services to third parties. We do not equate resale with the interconnection of private lines to the PSN. A user can connect a private line to the PSN,

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1 See generally Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956); Carterfone, 13 FCC 2d 420 (1968).

> even at both ends of the international circuits, for its private communications without engaging in resale. Conversely, one can engage in resale without connecting the private line to the PSN."[2]

The Commission emphasized that "our conclusions in this decision [adopting an IPL resale policy] do not alter our long-standing policy of allowing users to attach their private lines to the PSN for their private use."[3]

Subscribers have always been free to exercise their right to interconnect private lines to the PSN through PBX-type equipment or at a carrier's central office. In 1992 the Commission reaffirmed the policy permitting IPL interconnection at a carrier's central office when it stated:

> "In our International Resale Order, we reaffirmed our longstanding policy of allowing end users to interconnect private lines, including international private lines, to the PSN in the United States. We did not make any distinction between end users' international private lines interconnected at the end users' premises and those interconnected at a U.S. carrier's central office."[4]

It makes perfect sense to let subscribers choose between IPL interconnection through PBX-type equipment or central office interconnection. If end users are permitted to interconnect private lines to the PSN, they should be permitted to perform the interconnection themselves on their own premises or to subscribe

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2 Regulation of International Accounting Rates, 7 FCC Rcd 559, 560 (1991) [hereinafter "IPL Resale Order"].

3 Id.

4 Regulation of International Accounting Rates, 7 FCC Rcd 7927, 7930 (1992) [hereinafter "Reconsideration Order"].

to a facilities-based IPL interconnection service from their carriers.

In the IPL Resale Order, the Commission endorsed unlimited resale of international switched and private line services on the grounds that it would impose beneficial downward pressure upon accounting and collection rates. The one exception to this policy was the provision of switched services by carriers or subscribers through the "resale of U.S. international private line services."[5] In situations where the foreign country did not permit resellers to offer IPL interconnection to the PSN, the Commission feared that IPL resale at the U.S. end would exacerbate the U.S. net settlements imbalance and potentially cause higher collection rates for U.S. consumers. As a result, the Commission "require[d] U.S.-based carriers to permit resale of their international private-line services only to those countries that permit equivalent resale opportunities in the return direction."[6] Further, the Commission required U.S.-based carriers who desired to resell IPLs for the provision of switched services to obtain separate Section 214 authority.[7]

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5 IPL Resale Order, 7 FCC Rcd at 559 (¶ 4).

6 IPL Resale Order, 7 FCC Rcd at 560. The above-quoted passage, and other statements in the IPL Resale Order, make crystal clear that the Commission intended the IPL resale policy to apply only to "U.S.-based carriers" regarding the resale of "their international private line services."

7 On reconsideration, the Commission further narrowed the scope of the IPL resale policy by clarifying that it applies only to the provision of switched services via the resale of IPLs; the policy does not govern carriers who resell IPLs in order to provide a private line service. For a recent definition

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The Commission's careful distinction between IPL resale, which is prohibited to most countries, and IPL interconnection, which is permitted to all countries, collapses without a clear and meaningful distinction between resale and facilities-based activities. In the IPL Resale Order, the Commission referenced the well-established definition of resale as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public . . . for profit."[8] The Commission did not define what constitutes a facilities-based carrier, but in contemporaneous decisions the Commission defined facilities-based carriers as "carriers [who] own or lease international telecommunications facilities in order to provide international service."[9]

The distinction between IPL interconnection and IPL resale underlying the IPL resale policy requires an understanding of how IPL interconnection is normally provided in the marketplace. Carriers market their IPL services to business customers, and a customer typically establishes a subscriber relationship with an IPL carrier in the country in which the customer desires to be billed. As an example, let us assume that

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of non-switched services, see Alpha Lyracom d/b/a Pan American Satellite, 9 FCC Rcd 1282, 1284 (1994).

8 IPL Resale Order, 7 FCC Rcd at 565 n.7 (quoting Resale and Shared Use of Common Services, 60 FCC 2d 261, 271 (1976)).

9 Manual for Filing Section 43.61 Data, FCC Report 43.61 (July 1992), at page 4; see also id. at 12.

a business customer in Paris wishes to obtain an IPL to the United States. In that case, the customer would subscribe to an IPL service in France Telecom's tariff, and France Telecom would have the responsibility to obtain a matching half-circuit from a U.S. IPL carrier. The customer would not itself arrange for an end-to-end IPL service, nor would the customer have a direct carrier-subscriber relationship with the U.S. IPL half-circuit provider. Rather, the customer would be France Telecom's customer, it would be billed in France by France Telecom, and it would remit payment solely to France Telecom. The provider of the U.S. IPL half-circuit would receive compensation from France Telecom pursuant to a carrier-to-carrier operating agreement. The U.S. IPL half-circuit provider would not be providing an IPL service under tariff either to the customer or France Telecom; it would be providing the U.S. IPL half-circuit pursuant to a correspondent relationship with a foreign carrier.

Once the IPL is established, customers may obtain interconnection to the PSN in one of two ways. Evidence shows that the vast majority of IPL interconnection occurs through PBX-type equipment on a customer's premises. In the above example, the customer could install a PBX in an office in the U.S. which interconnects the IPL to the U.S. PSN. A small proportion of IPL interconnection occurs as a service offered by carriers through their central offices.[10] In that same example, the customer could

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10 See Letter from R. Koppel, IDB, to W. Caton, FCC (Sept. 17, 1993) (notifying Commission that approximately 3.7% of IDB's IPLs were interconnected to the U.S. public switched network

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terminate its IPL in the central office of the U.S. half-circuit provider, which would then interconnect the IPL to the U.S. PSN. In both cases, terminating traffic in the U.S. PSN through IPL interconnection will incur some usage-based charges. For PBX interconnection, the customer typically would pay those charges itself at the U.S. end of the call. For central office interconnection, the U.S. half-circuit provider would incur such charges in the first instance and then recoup the costs through its arrangements with the originating half-circuit provider. Either way, usage-based costs and pricing are inherently part and parcel of IPL interconnection.

In CC Docket No. 90-337, AT&T filed a petition for reconsideration seeking an expansion of the IPL resale policy to prohibit IPL interconnection at a carrier's central office. AT&T's proposed policy would apply to facilities-based IPL interconnection, thereby interfering with the long-protected right of subscribers to interconnect private lines to the PSN. AT&T has targeted central office IPL interconnection, which AT&T does not offer in the marketplace, rather than the more pervasive PBX interconnection, which AT&T's business customers widely employ. AT&T's self-interested proposal has been condemned on the record

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at a carrier central office); Letter from J. Markoski, Counsel for Coalition of International Telecommunications Users, to D. Cornell, FCC (Dec. 6, 1993) (most IPLs which interconnect to the U.S. public switched network do so at customer PBXs or PBX-like equipment while central office interconnection is "relatively infrequent").

by carriers and business users alike.[11] Indeed, not even one party supported AT&T's petition for reconsideration. AT&T's proposed policy would result in higher rates and less flexibility for U.S. business customers, interfere with investments made by customers and carriers in good faith reliance upon the Commission's long-established current policy, and impede the entry of U.S. carriers into newly-opening foreign markets. AT&T's petition remains pending in Phase II of CC Docket No. 90-337.

II. THE PROPOSED CODIFICATION OF THE IPL RESALE POLICY AND THE DEFINITION OF FACILITIES-BASED CARRIER WOULD EXPAND THE SCOPE AND APPLICATION OF THE POLICY

In proposing to "codify" the IPL resale policy and the definition of facilities-based carrier, the Commission evinced no intent to modify the policy in any way. However, the IPL resale policy articulated in the Notice (at ¶ 79), and in the recent decisions to grant AT&T's and MCI's applications for Section 214 authority to engage in IPL resale with the United Kingdom,[12] would

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11 E.g., Comments of the Coalition of International Telecommunications Users, CC Docket No. 90-337, Phase II, filed Feb. 12, 1993; Reply Comments of the Coalition of International Telecommunications Users, CC Docket No. 90-337, Phase II, filed Mar. 12, 1993; Letter from J. Markoski, Counsel for Information Technology Association of America, to D. Searcy, FCC (Feb. 12, 1993); Comments of First National Bank of Maryland, CC Docket No. 90-337, Phase II, filed Feb. 12, 1993; Opposition of American Petroleum Institute, CC Docket No. 90-337, Phase II, filed Mar. 23, 1992; Opposition of the Information Technology Association of America, CC Docket No. 90-337, Phase II, filed Mar. 23, 1992.

12 See AT&T Co., ITC-93-162, rel. Jan. 30, 1995 (Chief, International Bureau) [hereinafter "AT&T Order"]; MCI Telecommunications Corporation, ITC-95-031, rel. March 21, 1995 (Chief, International Bureau) [hereinafter "MCI Order"]. IDB filed an Application for Review of the AT&T Order on

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apply far more broadly than the policy adopted by the Commission in 1991. In particular, the definition of facilities-based carrier proposed in the Notice is narrower than the definition in use when the IPL resale policy was adopted in 1991, and the Notice would expand of the policy to govern facilities-based U.S. carriers depending upon the activities of foreign carriers at the foreign end.[13] In so doing, the Commission would substantially curtail the freedom of subscribers to interconnect their private lines to the U.S. PSN and the ability of U.S. carriers to enter newly-opening foreign markets. Before further considering its proposals, the Commission must (i) recognize that its proposals would expand the scope and application of the policy; (ii) analyze fully all material public interest factors and legal issues; and (iii) apply a new policy and definition, if any, on a prospective basis only.[14]

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March 1, 1995, which IDB hereby incorporates into the record in this proceeding.

13 Although the Commission proposed codifying the IPL resale policy and a definition of facilities-based international carrier, it attached no proposed rules to the Notice reflecting such a codification. Before the Commission codifies the policy or the definition, IDB submits that the Commission should formulate proposed rules and give interested parties an opportunity to submit comments. 5 U.S.C. § 553(b)(3).

14 It would be unlawful retroactive rulemaking for the Commission to expand the scope and application of the IPL resale policy on a retroactive basis. See 5 U.S.C. § 551(4); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); Motion Picture Ass'n of America v. Oman, 969 F.2d 1154, 1156-57 (D.C. Cir. 1992).

A. Definition of Facilities-Based Carrier.

The Commission proposes to "maintain [the] current definition of a facilities-based carrier."[15] Under the definition specified in the Notice, a U.S. carrier would be regarded as a facilities-based carrier if it (i) leases capacity from COMSAT, a non-common carrier submarine cable provider, or a non-common carrier separate satellite system, or (ii) purchases an ownership or IRU interest in a common carrier satellite or submarine facility.[16] U.S. carriers who lease capacity in a common carrier satellite or submarine facility would be regarded as resale carriers. The Commission does not specify the definition that would apply to foreign half-circuit providers, except that "foreign leased circuits" apparently would constitute resale within the meaning of the IPL resale policy.

IDB does not dispute that this definition is what the Commission now observes in practice for U.S. carriers.[17] (IDB is not aware of any definition adopted or currently used by the Commission for foreign half-circuit providers.) However, the Commission did not use that definition when it adopted the IPL resale policy in 1991. As the Notice acknowledges (at ¶ 67), IDB filed a Petition for Rulemaking (RM-8392) which demonstrated that

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15 Notice at ¶ 79 n.62.

16 Id. at ¶ 71.

17 The Commission has proposed, but not yet adopted, a similar definition in CC Docket No. 93-157. Rules for the Filing of International Circuit Status Reports, CC Docket No. 93-157, FCC 93-291, rel. July 2, 1993, at ¶ 2 n.2 (Notice of Proposed Rulemaking).

the Commission historically defined facilities-based carriers to be "carriers [which] own or lease international telecommunications facilities."[18] Under that definition, which applied when the IPL resale policy was adopted in 1991,[19] leasing capacity on common carrier submarine cable or satellite facilities was a facilities-based activity. Similarly, "foreign leased circuits" would presumptively involve a facilities-based activity under that definition. Although Commission staff has moved away from the historic definition of a facilities-based carrier as a matter of practice in the years following adoption of the IPL resale policy, the Commission has never formally abandoned the historic definition or adopted the modified definition proposed in the Notice.

B. Single-End Foreign Resale.

The Notice also would expand the current IPL resale policy as regards the putative resale activities of foreign carriers at the foreign end. First, the Commission states that a

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18 "Petition for Rulemaking," RM-8392, filed by IDB on Oct. 29, 1993, at 4 (quoting "Manual for Filing Section 43.61 Data," FCC Report 43.61 (July 1992) at 4 [hereinafter "FCC Manual"]).

19 IDB cited cases from 1991 and earlier in which the FCC applied 47 C.F.R. § 63.10(b) to U.S. carriers who leased circuits in common carrier cable and satellite facilities. That provision requires non-dominant facilities-based international carriers to report circuit additions on a semi-annual basis. E.g., "Requirement that Non-Dominant International Carriers File Semi-Annual Circuit Addition Reports (Section 63.10(b)), Report No. I-6421, 1990 Lexis 440 (Jan. 31, 1990); Adams Telegraph Co., 4 FCC Rcd 1646, 1647 n.6 (1989). See generally Letter from R. Koppel, IDB, to K. Kneff, FCC (March 24, 1993) (IC-93-02151) at pp. 5-7.

U.S. facilities-based IPL carrier must obtain separate Section 214 authority when resale occurs at the foreign end.[20] However, in the IPL Resale Order, the Commission imposed the requirement to apply for separate Section 214 authority only upon the reseller. "[W]e shall require a carrier . . . to obtain Section 214 certification for each country to which it seeks to resell a private line."[21] The Commission has never before required a fully certificated U.S. facilities-based carrier to obtain additional Section 214 authority to provide the U.S. IPL half-circuit on a facilities basis.

Second, the Commission states that the IPL resale policy will apply even where there is no resale of the U.S. half-circuit (i.e., where resale occurs, if at all, only at the foreign end).[22] However, the Commission emphasized in 1991 that the IPL resale policy rested on the "assumption that the reseller would operate at both ends of the international private line -- or, in traditional IMTS terms, that the reseller in the United States would act as its own correspondent at the other end of the international circuit."[23] In defining its policy, the Commission specified time and again that it applied to the resale of U.S.

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20 Notice at ¶ 79; AT&T Order at ¶ 7.

21 IPL Resale Order at 562 (emphasis supplied); id. at 561 (policy applies to an "applicant seeking authorization under Section 214 . . . to resell an international private line").

22 Notice at ¶ 79; AT&T Order at ¶ 7.

23 IPL Resale Order, 7 FCC Rcd at 561 n.24. The Commission expressly declined to address the so-called "IMTS option" involving single-end foreign carrier interconnections to the U.S. public switched network over IPLs. Id.

carriers' services.[24] The requirements that resale occur at the U.S. end and that the U.S. reseller apply for separate Section 214 authority are obviously complementary. If the IPL resale policy is applied to U.S. facilities-based carriers in a correspondent relationship with foreign carriers reselling IPLs at the foreign end, the Commission would substantially expand the policy adopted in 1991.

Third, it is not clear that the Commission still interprets the policy to require that resale occur at either the U.S. or the foreign end. While the Notice does not propose to depart from the resale requirement, the Bureau in the AT&T Order (at ¶ 7) and the MCI Order (at ¶ 6) stated that the policy would apply "whenever a carrier seeks to reroute switched traffic not subject to the settlements process over private lines interconnected to the PSN." By substituting the word "reroute" for "resell," the Bureau expanded the scope of the policy by several orders of magnitude. As adopted in 1991, the IPL resale policy applied to the routing (or "rerouting") of traffic onto IPLs only when it involved resale.[25] Modifying the policy to

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24 IPL Resale Order, 7 FCC Rcd at 559, 560 & 561 (¶¶ 2, 4, 9 & 20). That the Commission implemented its policy by requiring revisions to the tariffs of U.S. carriers is further evidence that the Commission intended the policy to apply only when resale occurred at the U.S. end.

25 The word "resale" appears in some form more than 170 times in the IPL Resale Order; the word "reroute" does not appear in any form even once. The Commission stated that "at the outset it is necessary to clarify that in this decision we address resale of international private lines for the provision of telecommunications services to third parties." Id., 7 FCC Rcd at 560 (emphasis supplied).

apply when resale is not involved would represent a material departure from existing practice.

III. THE COMMISSION SHOULD NOT EXPAND THE POLICY TO APPLY TO FACILITIES-BASED IPL INTERCONNECTION

The suggestion in the AT&T Order and MCI Order that the IPL resale policy applies to the rerouting of traffic onto IPLs rests upon the belief that the policy was designed to prevent the "diversion of switched traffic from the international settlements process."[26] That belief is only partially correct. While the Commission clearly sought to stem the tide of "one-way resale," it stopped short of proscribing all service offerings which migrated traffic away from the switched network. All types of IPL interconnection, including facilities-based applications which the Commission has expressly affirmed, involve some diversion of traffic onto IPLs which would otherwise have been carried over the international switched network. Indeed, at the extreme, an absolute anti-diversion policy would result in the prohibition of IPLs altogether, thereby forcing all traffic onto the switched network. The Commission has never embraced a policy of preventing customers from using IPLs to divert traffic from the public switched network in order to realize cost reductions from dedicated facilities.

In codifying the IPL resale policy and a definition of facilities-based carrier in this proceeding, the Commission should strive to embody the balance between IPL resale and IPL

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26 AT&T Order at ¶ 7; MCI Order at ¶ 6.

interconnection which underlies the IPL policy adopted by the Commission in 1991. Should the Commission desire to explore the policy and legal bases for its rulings in favor of giving customers the freedom to engage in facilities-based IPL interconnection, the Commission should incorporate the record in Phase II of CC Docket No. 90-337 into this proceeding. If, as IDB believes, the Commission's intent in the Notice was simply to codify in clear and specific terms the scope and application of the policy as adopted in 1991, then the Commission should make certain that any codification does not undermine the well-crafted balance between its pro-consumer and pro-competition interests, on the one hand, and its concerns about the potential negative impact of one-way IPL resale, on the other hand, which it built into its 1991 IPL resale policy.

IV. THE COMMISSION SHOULD ADOPT A NON-DISCRIMINATORY DEFINITION OF FACILITIES-BASED CARRIER WHICH PRESERVES THE DISTINCTION BETWEEN IPL RESALE AND IPL INTERCONNECTION

A. Definition of U.S. Facilities-Based Carrier.

The Notice fails to articulate any rationale for the proposed definition of a U.S. facilities-based carrier. The Commission offers no explanation for the seemingly arbitrary distinction between leasing capacity from COMSAT (which would be facilities-based) and leasing capacity from a common carrier submarine cable or satellite system (which would be resale). Nor does the Commission explain the seemingly arbitrary distinction between leasing capacity from a non-common carrier submarine cable (which would be facilities-based) and leasing capacity from a

common carrier submarine cable (which would be resale). These distinctions may reflect the Commission's current practice for U.S. carriers, but that practice has developed outside of the rulemaking process and contradicts the Commission's historic definition of facilities-based international carrier.

Neither the Commission nor any party has constructed a defensible rationale for the proposed definition of facilities-based carrier. AT&T has argued that when a carrier operates exclusively as a carrier's carrier, those carriers who lease capacity should be regarded as facilities-based carriers.[27] Apart from the absence of any logical basis for this distinction, this "carrier's carrier" theory is wrong factually. Contrary to AT&T's suggestion, COMSAT has not been limited to providing carrier's carrier services since 1985.[28] Further, non-common carrier submarine cable operators and separate system operators are authorized to provide, and do provide, capacity to non-carrier end users. Therefore, the "carrier's carrier" theory falls apart upon close scrutiny.[29]

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27 E.g., Opposition to Application for Review, filed by AT&T in ITC-93-162, March 16, 1995, at 8.

28 See The Commission's Authorized User Policy Concerning Access to the International Satellite Services of Communications Satellite Corporation, 100 FCC 2d 177 (1985).

29 While it is correct that COMSAT and certain non-common carrier providers do act, in part, on a carrier's carrier basis, that does not distinguish common carrier submarine cable operators or satellite operators who also may provide capacity to other common carriers. Nor does it distinguish foreign monopoly or duopoly carriers, who function in part on a carrier's carrier basis.

The definition proposed in the Notice appears to track the definition of facilities-based carrier in the proposed manual for filing Section 43.61 data.[30] The Draft Manual proposes a definition of facilities-based carrier encompassing U.S. common carriers who own the underlying transmission facilities in whole or in part, or U.S. common carriers who lease underlying capacity from non-reporting carriers such as COMSAT. Whatever definition the Commission adopts for reporting purposes, that definition should not govern its application of the IPL resale policy.[31] The identification of carriers and services who should be subject to restrictions on IPL interconnection is a policy decision which bears no logical relationship to the Commission's reporting requirements.[32]

IDB submits that the Commission should define a facilities-based carrier to be any carrier which obtains the

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30 "Draft Manual for Filing Section 43.61 Data," FCC Report 43.61, February 1995 [hereinafter "Draft Manual". The Commission placed the Draft Manual on public notice (Mimeo 52269) on February 21, 1995.

31 Indeed, before the Commission could use the definition proposed in the Draft Manual, it would have to explain why it has not imposed reporting obligations upon COMSAT or upon non-common carrier submarine cable operators and separate systems. The Commission's decision not to impose reporting obligations upon certain entities has no policy or logical relationship to the scope and application of the IPL resale policy.

32 Even if the Commission were to rely upon the Draft Manual, it should be noted that the Commission has proposed to create a new category of carrier under the heading of Facilities Resale, apparently a hybrid category. It would be a substantive policy decision for the Commission whether to apply the IPL resale policy to carriers who qualify as hybrid facilities-based carriers under the Facilities Resale category.

maximum interest permitted by law in the underlying transmission facility. This approach is a logical and defensible way of distinguishing IPL resale from IPL interconnection.[33] Further, as laws and policies change (such as a new policy permitting direct access by U.S. carriers to INTELSAT capacity), the "maximum interest" approach automatically makes the appropriate change to the definition of a facilities-based carrier. By contrast, the static definition proposed by the Commission would require additional rulemakings in order to adapt the definition to new laws and policies.

B. Definition of Foreign Facilities-Based Carrier.

The Notice appears to endorse a double-standard when it comes to the definition which would apply to foreign half-circuit providers. The Commission does not specify any definition, but it indicates cryptically that "foreign leased circuits" would be regarded as resale.[34] The Commission does not deny that such a definition would be inconsistent with the definition applied to U.S. carriers. A U.S. carrier who leases INTELSAT capacity from COMSAT would be facilities-based, but apparently a foreign carrier

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33 Further, the "maximum interest" approach may be fully consistent with the definition proposed in the Notice. Certainly, it would justify the classification of carriers who lease INTELSAT capacity from Comsat as being facilities-based carriers. Also, to the extent that non-common carrier operators do not make ownership interests available in the underlying facilities to third parties, the "maximum interest" approach would justify the classification of carriers who lease capacity in non-common carrier submarine cable or satellite systems as facilities-based carriers.

34 Notice at ¶ 71.